

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 24, 2008 Session

STATE OF TENNESSEE v. HOWARD W. BURNETT

Appeal from the Criminal Court for Knox County
No. 82080A Mary Beth Leibowitz, Judge

No. E2007-01788-CCA-R3-CD - Filed October 1, 2008

The Defendant, Howard W. Burnett, was convicted by a Knox County jury of one count of first degree murder. He was sentenced to life imprisonment. In this direct appeal, the Defendant makes the following claims: (1) the evidence at trial was insufficient to show premeditation; (2) the trial court erred by declining to admit into evidence the Defendant's rights waiver and certain post-arrest statements he made to police; and (3) the State committed prosecutorial misconduct by misstating the evidence and commenting on the Defendant's decision not to testify at trial. We conclude that these arguments lack merit and accordingly affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Robert R. Kurtz, Knoxville, Tennessee, for the appellant, Howard W. Burnett.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The homicide at issue in this appeal occurred on the evening of May 26, 2005, at the Ridgebrook Apartments in Knoxville. On that evening, a large group was "chillin', listenin' to music, and drinkin'" in the parking lot. The group included a Ridgebrook resident named Darrell Jacobs, a friend of the Defendant's named Jerome Goines, Goines' girlfriend Jessica Moore, the Defendant, the Defendant's girlfriend, and Eric Clark, the victim. According to Jessica Moore, everyone was "a little tipsy."

Darrell Jacobs testified that friction between the victim and the Defendant first developed when the victim began to flirt with the Defendant's girlfriend. The Defendant asked the victim a few times to stop flirting with her. The victim eventually did so, but not before the Defendant had become angry and left the parking lot.

Soon after this incident, Jacobs became aware that Jerome Goines was extremely upset because some men from across town had threateningly flashed their weapons at Goines while driving through the Ridgebrook complex. Goines called the Defendant, told him about this threat, and asked him to return to the parking lot, which the Defendant did shortly thereafter.

Goines wanted to take some action against the men from across town. The victim opposed this plan and had apparently persuaded Goines to hand over his gun. Goines wanted the gun back, but the victim refused to return it. After a few minutes, the Defendant joined the argument between Goines and the victim. Jacobs then went into his apartment and had no knowledge of the subsequent content of the argument.

Jessica Moore, who testified for the defense, remained in the parking lot. After another few minutes of argument, she witnessed the victim angrily leaving the parking lot in a white Lincoln, driving in the direction of the residence he shared with his girlfriend in the nearby Lonsdale Housing Community. Meanwhile, Goines and the Defendant wandered down the hill away from the parking lot area.

The victim returned fifteen to twenty minutes later, now driving a blue Buick. He exited the vehicle, leaving its lights on and its engine running. He was carrying an open bottle of beer and had a .38 caliber revolver in each of his back pockets. After asking Moore "where did them niggers go," he began to search the exterior of the complex for Goines and the Defendant, finding them only when they returned to the parking lot area a few minutes later.

Jacobs, who had not seen the victim leave and return, then briefly came back out to the parking lot. He and Moore both testified that the victim, the Defendant, and Goines began to argue again, although neither testified regarding the substance of the argument at this point. Jacobs again returned to his apartment. Moore testified that in the next few minutes, the argument became violent. Goines and the victim began pushing each other. At one point, the victim hit Goines with his elbow. The Defendant and the victim then began pushing each other. Soon after, the Defendant fired his gun at the victim.¹ Upon hearing the first gunshot, Jacobs ran to his balcony. He reached his balcony after three shots had been fired and observed the rest of the events from there.

Firearms Technician Patricia Resig, who later examined the Defendant's gun, testified that it had a capacity of eleven rounds; it could hold ten in its magazine and one in its chamber. Moore's

¹The record contains some suggestion that the gun he used to shoot the victim may have been the same one the victim had been holding back from Goines; Jacobs, on the other hand, testified that the Defendant procured the gun from inside his house after Goines called him and asked him to return to Ridgebrook.

testimony, Jacobs' testimony, and the results of the autopsy performed by the Knox County Medical Examiner, Doctor Sandra Elkins, confirmed that the Defendant in fact fired eleven rounds, in what might be characterized as three stages. First, he fired eight rounds into the victim's torso in rapid succession as the victim ran from him in an attempt to take cover behind a nearby car. The victim's right shoe, which police later found a few feet from his body, apparently came off as he scrambled to escape. Dr. Elkins testified that each of these eight bullets entered the victim's body moving from the victim's posterior to anterior with a right to left trajectory, meaning that the Defendant shot the victim eight times in the right side of his back. These injuries caused the victim to fall onto his back. He continued to move slightly in an effort to escape.

Next, the Defendant walked a few feet to the victim's location, stood over him, and fired two additional rounds into the victim's head. In addition to Jacobs' testimony that the victim was moving as the Defendant walked over to him, Dr. Elkins testified that the large quantity of blood released from the resulting head wounds indicated that the victim still had relatively high blood pressure, and he was thus still alive at the time the Defendant shot him in the head. Although she described one of the victim's lung wounds as "pretty fatal," it was not immediately fatal.

Finally, the Defendant fired once into the air, threateningly yelling "did anyone see anything?" Goines, meanwhile, had started the Defendant's car. The Defendant sat down in the passenger seat, and the two drove off.

A homicide call went out at about 8:20 p.m. Police and evidence technicians arrived shortly thereafter. Investigator Chris Bell of the Knoxville Police Department arrived at 8:46 p.m., and he acted as the lead investigator on the case. Arlethia Linzy, the victim's girlfriend, told Investigator Bell that Goines and the Defendant were involved in the shooting. Investigator Bell also learned that the two may have fled to Moore's residence. Early the next morning, Investigator Bell and his partner went to that residence and knocked on the door, yelling for the Defendant and Goines to come out. Investigator Bell's partner caught Goines as he attempted escape out a window. The Defendant gave himself up peacefully after another short period of persuasion. Both Goines and the Defendant were taken into custody. The Defendant cooperated with police and spoke to them after signing a Miranda waiver form.

Goines told Investigator Bell that he and the Defendant had hidden the murder weapon in a park about six miles from Ridgebrook. Investigator Bell found the gun there, in a plastic bag, half-buried and with dirt in its barrel as if it had been used as a digging implement. Its empty magazine was buried nearby. Investigator Bell delivered the weapon to Technician Resig, who confirmed it as a silver Lorcin 9mm pistol. She also test-fired the weapon, positively matching the results to the bullets and shell casings left at the crime scene and in the victim's body.

The Defendant was tried on September 25-27, 2006. He chose not to testify. The Defendant did not argue that he had not shot the victim; he instead called witnesses in an effort to establish that the victim had a violent past and that the Defendant had acted to defend himself and Goines. The jury convicted him of one count of first degree murder. He now appeals.

Analysis

I. Sufficiency of the Evidence of Premeditation

The Defendant argues that the evidence presented at trial was insufficient to show premeditation and that his conviction should therefore be reduced from first degree to second degree murder. Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State’s witnesses and resolves all conflicts in the evidence in favor of the prosecution’s theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

First degree murder is “a premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a). “[P]remeditation” is an act done after the exercise of reflection and judgment,” meaning “that the intent to kill must have been formed prior to the act itself.” Tenn. Code Ann. § 39-13-202(d). Although the mind requires no particular length of time to form the requisite intent to kill, a Defendant must be “sufficiently free from excitement and passion to be capable of premeditation.” Id. A jury may infer premeditation from the circumstances surrounding the killing. Bland, 958 S.W.2d at 660.

Our supreme court has enumerated a number of factors that may support the existence of premeditation. These include (1) declarations by the defendant of an intent to kill; (2) evidence of procurement of a weapon; (3) the use of a deadly weapon upon an unarmed victim; (4) the particular cruelty of the killing; (5) infliction of multiple wounds; (6) preparation before the killing for concealment of the crime; (7) destruction or sequestration of evidence of the murder; and (8) calmness immediately after the killing. State v. Nichols, 24 S.W.3d 297, 302 (Tenn. 2000).

Darrell Jacobs testified that the Defendant procured his weapon while the argument between Goines and the victim was going on; a rational jury could have found he did so in preparation for possible violence against the victim. Destruction or secretion of evidence is also present in this case. The Defendant went to a park about six miles from the site of the murder, dug a hole with the murder weapon, placed it into a plastic bag, and buried it. He removed the gun's magazine and buried it nearby.

The multiple wounds present in this case are also evidence of premeditation. We acknowledge that "repeated blows can be delivered in the heat of passion, with no design or reflection," State v. Brown, 836 S.W.2d 530, 542 (Tenn. 1992), and the Defendant argues that the proof in this case showed such a spontaneous act. This argument has some force with respect to the first eight shots he fired; the State did not present any direct evidence regarding the Defendant's actions or his mental state immediately before he fired these shots, and all proof indicated that the eight shots came in fairly rapid succession. As such, the State may not have presented evidence sufficient to demonstrate that the Defendant was free from excitement and passion when the gunfire began, especially because a heated argument preceded it. The Defendant would, therefore, have a stronger argument against the multiple wounds' significance had he stopped firing after the first eight shots or had he fired all ten in rapid succession.

The State primarily relied on the circumstances surrounding the final two shots, however, to show premeditation. Both prosecution witness Darrell Jacobs and defense witness Jessica Moore testified that the Defendant paused after his first eight shots in order to walk a few feet over to where his fleeing victim had fallen. Once there, he stood over the victim, pointed his gun at the victim's head, and fired two additional times. Dr. Elkins testified that these two shots caused the victim's death.

The Defendant's final two shots were not so close in time to the first eight that he must still have been under the effects, if any, of his argument with the victim. The evidence showed that the Defendant was sufficiently free from any excitement and passion to be capable of premeditation. He ceased fire after his first eight shots not for the purpose of ending his attack but in order to better position himself for additional shots. After so positioning himself above the victim, the Defendant deliberately aimed his weapon at the victim's head, an area to which bullet injuries are particularly lethal. He fired in a controlled manner, hitting the victim's head with both shots but leaving one bullet in his gun.

This proof, combined with the Defendant's procurement of a weapon and attempts to conceal evidence, could lead any rational trier of fact to find that the Defendant exercised dispassionate reflection and judgment, forming an intent to kill the victim. See Tenn. Code Ann. § 39-13-202(d). We therefore conclude that the evidence of premeditation was sufficient to support a conviction for first degree murder beyond a reasonable doubt.

II. Admissibility of Defendant's Post-Arrest Statements and Rights Waiver Form

The Defendant next argues that the trial court erred by excluding as hearsay a statement he made to police and also by excluding as irrelevant the Miranda waiver form he signed. The determination of whether evidence is logically relevant is governed by Tennessee Rule of Evidence 401. The determination of whether a statement is hearsay and whether it is admissible through an exception to or exclusion from the hearsay rule is governed by Tennessee Rules of Evidence 801-804. Trial courts exercise discretion in making relevance determinations, and we will not overturn their decisions absent an abuse of discretion. State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997).

A. Post-Arrest Statement

The Defendant did not offer proof of the content of his statement at trial or elsewhere in the record, rendering this issue difficult to review. We will discuss it briefly nevertheless. The Defendant's arguments at trial and in his brief indicate that he made a statement to police in which he claimed to be defending himself when he shot the victim. The trial court prevented the Defendant from eliciting testimony about this statement at trial, finding it to be inadmissible hearsay. The Defendant argues that the statement is not hearsay because it was offered not to prove its truth, but to show that, at the time of the killing, the Defendant had a state of mind insufficient to support premeditation. See Tenn. R. Evid. 801(c).

Tennessee Rule of Evidence 803(3) states that "[a] statement of the declarant's then existing state of mind" is not excluded from evidence by the hearsay rule. The statement at issue in this case, however, if it related to state of mind at all, related to the Defendant's state of mind at the time of the killing, not at the time the statement was made as required by the exclusion. Indeed, the Defendant's statement apparently was a "statement of memory or belief to prove the fact remembered or believed," a type of statement explicitly not covered by the exclusion on which the Defendant attempts to rely. See Tenn. R. Evid. 803(3). We conclude that the trial court did not err by excluding the statement from evidence.

B. Waiver Form

The Defendant similarly argues that the ability to introduce his rights waiver form, or other evidence of his willingness to waive his Miranda rights, would have assisted him in disproving the State's charge of premeditation. He does not, however, explain how his willingness to speak to police related to his mental state a number of hours earlier when he shot the victim. We conclude that the trial court did not err or abuse its discretion in finding this evidence irrelevant, as it has no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

III. Prosecutorial Misconduct

Finally, the Defendant argues two separate grounds of prosecutorial misconduct in the State's closing argument. First, he contends that the State violated the Fifth Amendment to the United States Constitution by commenting on his decision not to testify. See Griffin v. California, 380 U.S. 609, 614 (1965). Second, he argues that the State, after successfully excluding the Defendant's

exculpatory statement to police,² implied that the Defendant had in fact made no statements to police. This, he argues, was in violation of State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003) (noting that “it is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw”). The Defendant does not clearly delineate the exact portion of the argument he believes was improper. He cites three passages from the State’s closing argument; we will reproduce all of them and then discuss the Defendant’s points of error.

First, the Defendant directs our attention to the State’s comments on the viability of his arguments of self-defense and defense of a third person:

[State]: Their intent was never to surrender. They were there to make plans to leave. You heard Jessica Moore. He was going to get out of town. He wasn’t going to explain himself. There is no self-defense there. There was no defense of a third person. Every action he took was the action of a man who’s conscious of having done something wrong.

Think about it. If you had to kill someone, if somebody threatened you who’s going to pull a gun on you who came after you, who’s going to hurt you or your friend, and you had to shoot them, and you had to do it—you didn’t feel good about it but you had to—what would you do? You’d stay. You would tell the police. You’d let them know what happened.

He couldn’t do that because he knew he was wrong, and he needed time. He needed time to discard the evidence, to make his plans to get away, to talk to his friends, to figure out what he was going to say if he got caught, to talk to Jessica Moore, to talk to his brother Jessie, talk to Jerome, to try to figure out what he was going to do. All of his actions are consistent with somebody who’s guilty, guilty of a crime. He knew what he did was wrong.

Second, the Defendant points out the following passage from a later part of the State’s closing, discussing similar issues:

[State]: You’re going to have instructions in a few minutes, and I want you to go over them. And I want to talk to you a little bit about them because I think this is important. It’s important for you to understand why this is not a case of self-defense or defense of a third person. And when you get these instructions, keep in mind, we still don’t know what Burnett knew. All you have before you, the testimony of three witnesses and what their perceptions were.

And, third:

[State]: [The victim] was pushing Jerome. There’s no doubt about that. They were pushing at each other. He was probably mad at him, yeah, because he tried to help

²The statement is the same statement discussed in Section II above.

him. He tried to talk some sense into him, tried to keep him from getting into the kind of trouble that he had been in himself. The kid's too stupid to listen to him, still wanting a gun. Just like [the Defendant] was wanting to have his gun. For what purpose? We don't know, that would be speculation.

In successful claims of prosecutorial misconduct, a defendant must show that the argument was so inflammatory or the conduct so improper that it affected the verdict to his detriment. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). Tennessee courts "have traditionally provided counsel with a wide latitude of discretion in the content of their final argument" and trial judges with "wide discretion in control of the argument." State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). A party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999).

For a defendant to be entitled to a new trial on the basis of allegedly improper remarks during closing arguments, the remarks must be shown to have prejudiced the case by affecting the jury's verdict. Middlebrooks, 995 S.W.2d at 559. In determining whether this occurred, we consider the following factors: (1) the conduct viewed in light of the circumstances and facts in the case; (2) any curative measures taken by the trial court and the prosecution; (3) the prosecutor's intent in making the improper statements; (4) the cumulative effect of the prosecutor's statements and other errors in the record; and (5) the relative strength and weakness of the case. Id. at 560.

A. Fifth Amendment Violation

The Defendant's contention that the prosecution violated his Fifth Amendment right against self-incrimination relies on all three passages above, but particularly on the statements that "we still don't know what [the Defendant] knew" and that determining why the Defendant armed himself "would be speculation."

We conclude that the State simply intended to argue that the Defendant generally had offered little evidence supporting the self-defense claims, and insufficient evidence to counter the State's proof of premeditation. The State suggested not that the Defendant himself should have testified as to his mental state, or that his failure to testify was evidence of guilt, but simply that he had put on insufficient evidence to establish self-defense, and that his arguments against premeditation had failed to prevent the State from proving first degree murder beyond a reasonable doubt. We conclude that this issue lacks merit.

B. Misstatement of the Evidence

The Defendant's contention that the State misstated the evidence appears principally to revolve around the State's argument that an innocent person would "tell the police" and would "let them know what happened." This, the Defendant responds, is exactly what he did in the post-arrest statement that the State successfully asked the Court to exclude.

In our view, it is evident from the circumstances and facts in the case that the State was referring to the Defendant's conduct between the time the crime was committed and the time of his arrest. The argument at issue simply did not discuss whether or not the Defendant had made any statements after police took him into custody. Even if the State's conduct had been improper, the Defendant cannot show that it prejudiced the jury, especially given Investigator Bell's testimony that the Defendant was cooperative during and after his arrest. This issue is also without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's conviction for first degree murder.

DAVID H. WELLES, JUDGE